FILE COPY

Office-Supreme Court, U.S.
FILED
APR 10 1961
JAMES R. BROWNING, Clerk

No. 321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioners

VS.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF FOR UNITED STEELWORKERS OF AMERICA AND INTERNATIONAL CHEMICAL WORKERS UNION, AMICI CURIAE

DAVID E. FELLER
JERRY D. ANKER
FELLER, BREDHOFF AND ANKER
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

Attorneys for United Steelworkers of America and International Chemical Workers Union.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
I. The Board's Brief Bears No Relation to the Board's Decision	2
II. The Underlying Error in the Board's Approach	12
III. The Underlying Error in Board Counsel's Approach	17
CONCLUSION	23

TABLE OF CITATIONS

Cases

Brewery Drivers Local 67 (Washington Coca-Cola Bottling Works, Inc.), 107 N.L.R.B. 299 (1953), *enforced*, 220 F. 2d 380 (D. C. Cir. 1955) 16

General Drivers Local 968 (Otis Massey Co.), 109 N.L.R.B. 275 1954), *enforcement denied*, 225 F. 2d 205 (1955), cert. denied, 350 U. S. 914 (1955) 16

International Brotherhood of Teamsters (Alexander Warehouse); 128 N.L.R.B. No. 105, 46 L.R.R.M. 1409 (August 25, 1960) .. 15

International Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service), 87 N.L.R.B. 502 (1949) 13

International Organization of Masters, Mates and Pilots, 125 N.L.R.B. 113 (1959) 15

Local 36, Int'l Chemical Workers Union v. N.L.R.B. (Virginia-Carolina Chemical Corp.) (now pending in this Court on petition for Certiorari, this Term, No. 680) 3, 6, 9

Local 618, Automotive Employees, 116 N.L.R.B. 1844 (1956), *reversed*, 249 F. 2d. 332 (8th Cir. 1957) 16

Local Union No. 55 and Carpenter's District Council (PBM), 108 N.L.R.B. 363 (1954), *enforced*, 218 F. 2d 226, 228 (C.A. 10, 1954) 22

Milwaukee Plywood Co. v. N.L.R.B., 47 L.R.R.M. 2291 (7th Cir. Dec. 20, 1960) 16

NLRB v. International B'hd of Electrical Workers, 181 F. 2d 34, (1950), *aff'd*, 341 U. S. 694 (1951) 14

NLRB v. International Union of United Brewery Workers, 272 F. 2d 817 (10th Cir. 1959) 16

NLRB v. Denver Bldg. & Const. Trades Council, 341, U. S. 675 (1951) 14, 20

NLRB v. General Drivers Local 968, 225 F. 2d 205 (5th Cir. 1955) 16

Page

NLRB v. Local 244, Int'l B'hd of Teamsters, 284 F. 2d 887 (2d Cir. 1960) 16

Newspaper and Mail Deliverers' Union (Interborough News Co.), 90 N.L.R.B. 2135 (1950) 13

Oil Workers International Union, Local 346 (The Pure Oil Co.), 84 N.L.R.B. 315 (1949) 13

Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market), 116 N.L.R.B. 856 (1956), *nforced,* 249 F. 2d 591 (C.A. 10, 1957) 19

Sales Drivers Local 859 110 N.L.R.B. 2192 (1954), *reversed,* 229 F. 2d 514 (D. C. Cir. 1955), *cert. denied,* 355 U. S. 972 (1956) 16

Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950) 13, 14

SEC v. Chenery Corp., 318 U. S. 80 (1943) 3

Union De Trabajadores (Gonzales Chemical Industries, Inc.), 128 N.L.R.B. No. 116, 46 L.R.R.M. 1423 (August 26, 1960) .. 11

United Electrical & Machine Workers (Ryan Construction Corp.) 75 N.L.R.B. 417 (1949) 8, 13

United Steelworkers of America (Phelps-Dodge Refining Corp.), 126 N.L.R.B. No. 168, 45 L.R.R.M. 1474 (March 31, 1960), pending on review in United States Court of Appeals for the Second Circuit, No. 26252 9-11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 321

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioners

VS.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR UNITED STEELWORKERS OF AMERICA AND INTERNATIONAL CHEMICAL WORKERS UNION, AMICI CURIAE

INTRODUCTION

This reply brief is submitted by the United Steelworkers of America and the International Chemical Workers Union, *amici curiae*, with the consent of the parties. Under normal circumstances, a reply brief in this Court by an *amicus curiae* is an exercise in redundancy. Presumably, by the time a case comes to this Court the issues have been so refined before the briefs of the parties have been submitted that the brief of an *amicus curiae* can address itself to the issues presented to the Court.

This case, however, is not an ordinary case. The issue

which was decided by the Board in this case, and to which the opening briefs principally addressed themselves, has largely disappeared. Instead, an entirely new issue has appeared which makes irrelevant almost all that has gone before. Hence this brief.

I. THE BOARD'S BRIEF BEARS NO RELATION TO THE BOARD'S DECISION

What has happened in this case is yet another repetition of a story, old to the practitioners of labor law, which by now should also be familiar to this Court. The Labor Board begins the story by making a decision which reinterprets and applies the statute in an indefensible way. The Board pretends to no expertise or balancing of interests. Instead, it simply decides that a given fact "X", heretofore always regarded as immaterial, equals an unfair labor practice. The Board is then assailed in the courts for its change in doctrine. The case finally reaches this Court. Then, suddenly, and for the first time, we find revealed in the brief submitted for the Board an "expert administrative judgment" [1] based on a balancing of facts which the Board itself had ignored. The Board's conclusion, which up to this point simply relied on its fiat that "X" equals an unfair labor practice, suddenly is transformed by its counsel's learned brief into a reflection of "administrative experience, appreciation of the complexities of the problem . . . and responsible treatment of the . . . facts." [2]

Counsel opposing the Board are then in a most difficult position. The case has been presented to the Board, decided by the Board and argued in the Court of Appeals without reference to the theory so beautifully added afterwards in this Court or to the facts upon which that theory rests. But in this Court every expectation is reversed. The issue

---

[1] Board Brief, p. 50.
[2] Id. p. 51.

which counsel thought was the issue (which—more importantly—the *Board* thought was the issue) is lost in a balancing of factual considerations which, until the General Counsel's brief was filed in this Court, never were relied upon.

Counsel can ignore the change of pace and, treating this Court as if it were the Board, urge that a decision on the ground now asserted is contrary to the statute. Or counsel can cry *"Chenery, Chenery, Chenery,"*[3] and assert—as we do—that what is being passed off as Board expertise is the expertise of the Board's counsel. In either case most of the arguments which counsel for the parties first made, which were directed at what the Board actually decided, are largely irrelevant.[4]

Equally important—at least to these *amici*—is the fact that the rationale created in this Court to justify the Board rests on facts which only appear fortuitously in the record of the particular case, and which are totally absent in other cases decided by the Board on the same basis. As counsel in these other cases, we are truly confounded. We had thought —because the Board had said so—that those cases involved the same issue. The Solicitor General so informed this Court. (See Memorandum for the National Labor Relations Board in No. 680). Yet suddenly it is made to appear that the "lead" case depends on facts heretofore regarded as irrelevant which do not appear in the other cases. Even if counsel for the Board should be successful in palming off their justification for the result in the "lead" case, what is to happen to the others?

We think we know what the answer should be. The Board and its counsel should be told bluntly that the Board's decision must stand or fall on the basis on which the Board decided it. All of the cases decided by the Board on the same

---

[3] *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943).

[4] We do not intend to be critical of counsel for the Board. To the contrary, we are full of admiration. Who would dream that what at least looks like a silk purse could be made out of *that* sow's ear!

basis should be disposed of in the same way. New theories as to how the Act should be applied should be advanced by the General Counsel before the Board, not here, and they should be advanced in cases in which the facts now argued to be determinative can be fully litigated, not cases in which they appear accidentally.

Having said this in general terms, we are obliged, we recognize, to demonstrate that our characterization is accurate. This we shall now proceed to do.

1. *The rationale presented to this Court.* In this Court, counsel for the Board argue that this case is a "common work site" case.[5] It is conceded that the right to picket includes not only the right to appeal to employees of the primary employer, but the right to appeal to third persons—*i.e.*, employees of other employers—to withhold their business or services from the struck employer.[6] There is a right to do this deliberately and intentionally, not merely as an incident to the appeal to those employed directly by the primary employer. But, it is said, where the Board finds that the premises of a struck employer have become the common work site of that employer and a neutral employer, the Board is justified in finding that appeals directed solely to the employees of the neutral are "secondary." This does not mean, it is said, that every industrial plant is a common situs. In order for the rule of this case to come into play, "it must be established . . . that the neutral employer is at the plant for such a long and continuous period that it has in effect become a regular work place for his employees."[7] Once this is established, the argument runs, the Board has the right under the Act to find, as it did in this case, that picketing at a separate gate reserved for the employees of the neutral employer is truly secondary. It may be difficult to draw the fine line between the cases where the plant is a common

[5] Board Brief, p. 19.
[6] Board Brief, p. 20.
[7] Board Brief, p. 50, n. 42.

work site and the cases where it is not, but that is the reason why the Board's expert judgment and its responsible treatment of the facts must be respected.[8]

2. *The Board's rationale.* The astonishing thing about the actual decision of the Board in this case is that the careful distinction which is now urged to be its very foundation had nothing whatsoever to do with it.

The question of whether the case was to be treated as a common work site case was mentioned at the hearing before the Trial Examiner. The General Counsel's position, as reflected in the Examiner's Intermediate Report, however, was that this was *not* a common situs case. His position appeared to the Trial Examiner to be that picketing a struck employer at a separate gate reserved for the employees of other employers constituted, *per se,* a violation of Section 8(b)(4). (R. 29-31).

The Trial Examiner rejected this contention. When the case came to the Board, there was no doubt whatsoever as to its view. The Board reversed the Trial Examiner's conclusions—but none of his factual findings. *All* of the Board's reasoning is contained in the following extract from its opinion:

> "The Trial Examiner found no violation because he was of the opinion that the picketing at gate 3-A was 'traditional' picketing protected by the Act. We disagree.
>
> "We find from the foregoing that only the independent contractors' employees were permitted to use gate 3-A, and that the Respondent was aware of this fact. We find also that the Respondent's object in picketing at gate 3-A was to enmesh these employees of the neutral employers in its dispute with the Company. Such purpose is shown not only by the picketing at gate 3-A but also by the oral appeals to the employees of neutrals not to cross the picket line.

[8] Board Brief, pp. 49-51.

> "Accordingly, in view of the foregoing, and upon the record as a whole, we find that the Respondent violated Section 8(b)(4)(A) of the Act by inducing and encouraging the employees of independent contractors to engage in a concerted refusal to work with an object of forcing the independent contractors to cease doing business with the Company." (R. 42)

The finding which we are now told is critical—that the General Electric premises had become the "regular work place" of the contractor's employees—was not made at all. The simple basis for the Board's decision was that the object of the picketing at the separate contractors gate "was to enmesh these employees of the neutral employers. . . ."

If there were any doubt that this was the basis for the Board's decision, that doubt certainly would be resolved by Member Fanning's concurrence. Unlike the other members of the Board, he was not prepared to say that *"separate gate* equals *enmeshing other employees* equals *secondary boycott."* He alone argued that the Board should interdict the picketing because this was a case to which the "common situs" rules should apply.

3. *The subsequent cases.* That the Board's doctrine was a "separate gate" doctrine *per se* and was wholly unrelated to whether the plant premises had become established as the "common working place" for two employers was quickly demonstrated in subsequent cases.

The first of these was the *Virginia-Carolina Chemical Corp.* case, involving the International Chemical Workers, which is now pending on petition for certiorari in this Court as No. 680, and which the Solicitor General has assured this Court "presents the same issue" as the instant case.[9]

In *Virginia-Carolina* the Union went on strike against the Virginia-Carolina Chemical Corporation on May 22, 1959.

---

[9] Memorandum for the National Labor Relations Board, *Local 36, International Chemical Workers Union* v. *NLRB*, No. 680, p. 1.

On June 1, 1959—nine days after the strike began—the company executed an agreement with the Wellman-Lord Engineering, Inc., a construction company, for the installation of certain equipment on the plant premises. It began to construct a fence around the property. On June 12, a short four days after the Board's decision in the *General Electric* case, Virginia-Carolina announced that one gate in this fence would be established for the exclusive use of Wellman-Lord employees. When the union, which had been picketing the entire plant, continued to do so and none of the Wellman-Lord employees would cross the picket line, unfair labor practice charges were filed on the basis of the Board's decision in the *General Electric* case.[10]

The contentions of the parties in the *Virginia-Carolina* case are set forth clearly in the Trial Examiner's Report:

> "Relying principally on the recent *General Electric* case, the General Counsel and V-C contend that Local 36 has violated Section 8(b)(4)(A), of the Act by picketing at an entrance way which, with the knowledge of Local 36, had been set aside for the exclusive use of Wellman's and other independent contractor's employees . . .
>
> "Local 36 would distinguish the *General Electric* case from the instant situation in that, unlike the present situation, the separate contractor's gate in the *General Electric* case was established long before the labor dispute arose and picketing activities began. To extend the *General Electric* case to the present situation, contends Local 36, would in effect permit a primary employer by his 'self-serving act' to convert otherwise lawful picketing into unlawful secondary activity. The theory of the *General Electric* case seems to be, however, that a primary employer may withdraw a portion

[10] The facts are set forth in the Trial Examiner's Intermediate Report which is reproduced in the Joint Appendix in No. 680 at pp. 251-263.

> of his own premises from the primary situs category and thus delimit the geographical scope of otherwise proper picketing, and I fail to see that the timing of such withdrawal, be it before or after picketing, is material. Local 36's basic disagreement would appear to be with the *General Electric* case itself."[11]

The issue, thus squarely drawn, obviously had not the slightest reference to the question of whether the premises of Virginia-Carolina had become the "regular working place" for Wellman-Lord employees for the simple reason that none of those employees had begun to work when the picketing took place. Only after the Board, relying on the *General Electric* case, had obtained an injunction against the picketing did the Wellman-Lord work begin.

How then did the Board apply what its counsel now say is the critical consideration? It didn't. It simply applied its *General Electric* rule, explicitly overruled the *Ryan Construction Corp.* case[12] and found the union guilty of violating the Act.[13]

The union sought review in the Court of Appeals for the District of Columbia. It urged, in its brief, that the fact that the gate for the contractor's employees had not been established before the strike began distinguished the case from the *General Electric* case. The Board disagreed. The *General Electric* case, it said "is dispositive of the principal issue in this case—whether picketing a separate gate of an employer's premises reserved for the use of independent contractors working at those premises violates Section 8(b)(4)(A)."[14] When did the picketing which had been primary

---

[11] Id. at pp. 256-257.

[12] *United Electrical & Machine Workers (Ryan Construction Corp.)* 85 N.L.R.B. 417.

[13] Joint Appendix, No. 680, p. 268.

[14] Brief for the National Labor Relations Board, *Local 36, Int'l Chemical Workers* v. *NLRB,* United States Court of Appeals for the District of Columbia Circuit, No. 15631, p. 7.

become secondary? "The moment employees of a neutral employer began, or attempted to begin, working there."[15]

Concluding from the Board's brief that the issues were the same in the *Virginia-Carolina* case as in the *General Electric* case, counsel so stipulated, the Court ordered the Board's order enforced and a petition for certiorari was filed in this Court. *Local 36, Int'l Chemical Workers Union, AFL-CIO* v. *NLRB,* No. 680, this Term. The Solicitor General in response to the petition for certiorari asserted to this Court that the case "presents the same issue as is involved in *Local 761, Int'l Union of Electrical Workers v. NLRB,* No. 321."[16] This Court is presumably holding the petition for certiorari for disposition on the basis of its decision in the present case. But nowhere in the *Virginia-Carolina* case, from the hearing before the Trial Examiner, through the Board and the briefs presented to the Court of Appeals, and finally in this Court, has it even been suggested that the primary employer's premises had become the "regular working place" of the contractor's employees.

The next case to come along involved a strike at the Phelps-Dodge Refining Corporation by the United Steelworkers of America. In that case the company in July of 1959 cut a new opening in the fence surrounding its plant in anticipation of a strike which began on August 3, 1959. When the striking union picketed that gate, as well as the other gates, unfair labor practice proceedings were begun in reliance upon the Board's decision in the *General Electric* case. The General Counsel's contention, as set forth by the Trial Examiner in the *Phelps-Dodge* case, was as follows:

> "The General Counsel contends that the case at bar is similar in all respects to the *General Electric* case where the Board held that a union violated Section 8 (b) (4) (A) by picketing an employer's plant gate that

---

[15] *Id.* at p. 11.

[16] Memorandum for the NLRB, No. 680, p. 1.

was used exclusively by employees of independent contractors who had construction contracts with the employers." [17]

The union's contention was described and disposed of by the Trial Examiner in the following language:

> "The Respondent's contention that the *General Electric* case can be distinguished from the instant situation in that in *General Electric,* the contractor's gate had been in existence for over 4 years while in the case at bar, the contractors' gate was built a few days before the strike, is not a substantive distinction. It is a distinction without a difference because the controlling factor in this proceeding is the Respondent's knowledge, prior to the strike, that such a gate had been constructed and opened under extensive safeguards to insure its exclusive use by contractors and their employees." [18]

The question of whether the contractor's employees had been in the plant for a long and continuous period was nowhere adverted to by the Trial Examiner. Indeed, as the foregoing suggests, he would have regarded the period of the contractor's employment as relating to "a distinction without a difference."

The Trial Examiner decided the case simply on the basis that the Board had concluded in *General Electric* that picketing at a contractor's gate constituted a secondary boycott. The Board affirmed the Trial Examiner's ruling without comment and without any finding as to how long the contractor's employees had worked at the plant before the strike and the picketing. *United Steelworkers of America (Phelps-Dodge Refining Corp.),* 126 N.L.R.B. No. 168, 45 L.R.R.M. 1474.

Review was sought in the Court of Appeals for the Second

---

[17] 126 N.L.R.B. No. 168, Joint Appendix, *United Steelworkers of America* v. *NLRB,* United States Court of Appeals for the Second Circuit, No. 26252, p. 76.

[18] Id. at 87.

Circuit and the case is now pending there after argument.[19] The Board's decision, as described by its counsel in that case, was simply that the union "by picketing at gate F, knowing that the gate was reserved for the exclusive use of the contractors and their employees, induced and encouraged the employees of these neutral employers in order to force the independent contractors to cease doing business with the Company."[20] The case, therefore, the Board contended was "indistinguishable in all pertinent respects" from the instant case.[21] Yet not a word was said about whether the Phelps-Dodge premises had become the "regular working place" of the contractors' employees.[22]

---

[19] *United Steelworkers of America* v. *NLRB*, No. 26252.

[20] *Id*, Brief for the National Labor Relations Board, p. 7.

[21] *Id*. at p. 13.

[22] One of the unfortunate hazards of supporting the Board's position before the courts (in addition to the difficulty that the position may be unsupportable) is that the Board's position is unpredictable. Thus in the *Phelps-Dodge* case the union argued that if picketing at a separate gate constitutes a violation of Section 8(b)(4)(A), then the same decision should follow even in the absence of a separate gate. Counsel for the Board replied in the following language:

> "Petitioners suggest (Br. p. 15) that the Board's decision here, and in cases such as *Local 761*, would have to be the same even had there been no contractors' gate, and picketing took place at gates used by all persons entering the premises, including employees of the primary employer and of neutral employers. This 'reductio ad absurdum' argument is manifestly without merit." (Board Brief, pp. 22-23).

Unfortunately for Board counsel the Board approved just this "reductio ad absurdum" at almost the same time that counsel submitted their brief to the Court of Appeals for the Second Circuit. *Union De Trabajadores (Gonzales Chemical Industries, Inc.)*, 128 N.L.R.B. No. 116, 46 L.R.R.M. 1423 (August 26, 1960). In that case, in which the separate gate rationale was obviously unavailable, the Board for the first time suggested that picketing a struck plant might be unlawful if it induced the employees of contractors who were "engaged in work for a relatively extended period of time" on the premises not to cross. That reasoning, be it noted, appeared a year and a half after the *General Electric* case and was not related by the Board in any way to the *General Electric* case. It was applied only because the factual basis for the *General Electric* rule—the separate gate—did not exist.

As must be overwhelmingly apparent at this point, the Board's decision in the present case and in the two pending cases in which these *amici* are involved were totally unrelated to the fine-spun theory now presented to the Court. This, in itself, should be sufficient to end the matter. Neither we, nor the petitioner in this case, should be obliged to go further and point out the errors in the approach which is now offered in order to justify the Board decisions. Failure to comment on the Board's present theory, however, might be taken as at least an indication that it is arguably correct. Hence we shall discuss it, briefly. Before doing so, we think it appropriate to discuss, also briefly, what we regard to be the underlying error in the Board's approach which led it to the position which its counsel have now abandoned.

II. THE UNDERLYING ERROR IN THE BOARD'S APPROACH.

This case, and the two other "separate gate" cases now pending, are but symptoms of a disease—the end product of a basic misconception which has found expression in many other cases. It is important, we think, to identify that misconception and indicate the various ways in which it had led the Board into totally uncalled-for applications of the Act.

The basic misconception is simply that Congress intended by Section 8(b)(4) to say that, when a union strikes, the only legitimate function of its picket line is to persuade the employees of the struck employer not to work. Picketing which induces third persons to withhold their business or services from the struck employer is legitimate, in this view, only if it is an unavoidable incidental to this primary function of the picket line. Otherwise, it is an unnecessary enmeshment of neutrals—a "secondary boycott."

This was not the view of the Board which first interpreted the Act. In a host of cases decided between 1949 and 1954

—*Pure Oil*,[23] *Shultz Refrigerated Service*,[24] *Ryan Construction*,[25] *Interborough News*,[26] and *Moore Dry Dock*[27]—the Board made clear what its counsel now acknowledge in this Court: that the right to picket includes the right "to influence third persons to withhold their business or services from the struck employer." What was prohibited by Section 8 (b)(4) was not pressure against the struck employer through the direct loss of business or services performed for him, whether by his employees or by others, but secondary pressure—pressure against a third person, exerted by withholding services from him, to induce him to decide to cease doing business with the struck employer. The question was at which employer was the pressure being directed by the action in question, not whether the persons being induced were technically his employees. When the primary employer conducted his business or part of it at another employer's premises the answer to that question became difficult, and rules had to be developed in those situations to limit picketing to the allowable pressure on the primary employer, but the principle was never in doubt.

Thus where the primary employer's business consisted of making deliveries at retail stores it was permissible to picket trucks while making deliveries at the store in an effort to induce store employees not to accept the merchandise when it was delivered. This was primary since it was directed at the primary employer's business.[28] But picketing to induce

---

[23] *Oil Workers International Union, Local 346 (The Pure Oil Co.)*, 84 N.L.R.B. 315 (1949).

[24] *International Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service)*, 87 N.L.R.B. 502.

[25] *United Electrical Workers, Local 813 (Ryan Construction Corp.)*, 85 N.L.R.B. 417 (1949).

[26] *Newspaper and Mail Deliverers' Union (Interborough News Co.)*, 90 N.L.R.B. 2135 (1950).

[27] *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950).

[28] *International B'hd of Teamsters (Schultz Refrigerated Service, Inc.)*, 87 N.L.R.B. 502 (1949).

the store employees not to perform services for their employer so that he, in turn, would be forced or required to stop doing business with the primary employer was secondary.[29] To confine picketing to its permitted functions, in these and similar situations, the *Moore Dry Dock* rules were devised.

The *Denver Building Trades*[30] case, which was decided by the Board in 1949 and by this Court in 1951, was completely consistent with this basic approach. In the *Denver* case the union struck against a general contractor in pursuit of its demand that an electrical sub-contractor, who was non-union, be removed from the construction job. The object of the action was to force or require the general contractor to cease doing business with the electrical sub-contractor. If these two employers could be regarded as separate enterprises, the action by the union was clearly secondary. The only argument in the *Denver Building Trades* case was as to whether the nature of the construction industry was not such that the various sub-contractors should be regarded as being engaged in a joint enterprise with the contractor. The dissenters in *Denver,* the unanimous opinion of the Court of Appeals for the District of Columbia Circuit which was reversed in *Denver,* and the dissent in *NLRB* v. *International B'hd of Electrical Workers* in the Second Circuit,[31] argued that a building project should be treated in the same way as an industrial plant so that a dispute dealing with any part of the work being done on the project should be treated just as a dispute dealing with any part of the work in an industrial plant. A majority of this Court decided otherwise. In so doing, however, the Court expressly acknowledged that picketing to persuade employees of customers, as in *Rice Milling,* not to enter the struck plant was "traditional and permissible

---

[29] See *Id.* at 508 n. 14.

[30] *NLRB* v. *Denver Bldg. & Const. Trades Council,* 341 U. S. 675 (1951).

[31] 181 F. 2d 34, 40 (1950), *aff'd* 341 U. S. 694 (1951).

in a primary strike. The union did not engage in a strike against the customer. It did not encourage concerted action by the customer's employees to force the customer to boycott the mill. It did not commit any unfair labor practice proscribed by Section 8(b)(4)." 341 U. S. 675, at 689-690.

This explanation in the *Denver* opinion served to fortify rather than disturb the Board's general position that conduct by which customers, or suppliers, or other persons, were persuaded not to enter a struck plant was lawful as traditional and permissible primary strike activity. And, as the briefs already submitted to the Court show beyond question, that position was wholly in accord with the statutory purpose.

Beginning in 1954, however, shortly after a new majority was appointed, the Board began to change its view. This change had nothing to do with the *Denver Building Trades* case or with common or roving situs cases—although the rules in those cases, as in others, were affected by it. The change was far more significant and based on a not-quite-acknowledged reversal of the basic premise of the earlier cases: that picketers had the right to appeal to third persons not to continue to perform services for the struck employer at his place of business. Where the picket line also, either actually or theoretically, served the purpose of appealing to the employees whom the union sought to call on strike, then the effect on others was regarded as an undesirable but inevitable incident. But as situations turned up in which, for one reason or another, the picket line could not be justified on this basis, the Board, without ever completely articulating the fact that it was shifting its position, began to find the picketing unlawful. It was not consistent in so doing—see *International Brotherhood of Teamsters (Alexander Warehouse)*, 128 N.L.R.B. No. 105, 46 LRRM 1409; *International Organization of Masters, Mates and Pilots*, 25 N.L.R.B. 113, 126—but the trend was plainly apparent.

So, if the primary employer withdrew his employees from

the premises, the picket line which then served only to induce others not to enter the struck premises became secondary.[32] Or, in the roving situs case, if there was a place where the picketers could appeal to the primary employer's employees, then the trucks could not be followed.[33] And, finally, if there were a separate gate through which only employees of contractors passed to work on the primary employer's plant, then obviously picketing at that gate was not essential to maintain the solidarity of the strikers.

The results involved no balancing of factors, no appreciation of complexities, no responsible treatment of the facts. They followed simply and directly from the Board's premise —a simplicity and directness which is admirably illustrated by the Board's opinion in this case and the other two "reserved gate" cases.

Counsel for the Board have now acknowledged what almost all of the courts of appeal have held when faced with this new premise—that it is simply erroneous.[34] They have jettisoned, and properly, the Board's premise. The fact that they have done so, however, should not camouflage the undeniable fact that it is this premise which is the source of the disease. This case is not just an isolated instance of error, but part of an entire course of erroneous decision. If

---

[32] *Local 618, Automotive Employees,* 116 N.L.R.B. 1844 (1956), *reversed,* 249 F. 2d 332 (8th Cir. 1957).

[33] *Brewery Drivers Local 67 (Washington Coca-Cola Bottling Works, Inc.),* 107 N.L.R.B. 299 (1953), *affirmed,* 220 F. 2d 380 (D. C. Cir. 1955); *Sales Drivers Local 859,* 110 N.L.R.B. 2192 (1954), *reversed,* 229 F. 2d 514 (D. C. Cir. 1955), *cert. denied,* 350 U. S. 914 (1956); *General Drivers Local 968 (Otis Massey Co.),* 109 N.L.R.B. 275 (1954), *enforcement denied,* 225 F. 2d 205 (1955).

[34] *Sales Drivers Local 859* v. *NLRB,* 229 F. 2d 514 (D.C. Cir. 1955), *cert. denied,* 350 U. S. 914; *NLRB* v. *General Drivers Local 968,* 225 F. 2d 205 (5th Cir. 1955), *cert. denied,* 350 U. S. 914 (1956); *Local 618, Automotive Employees* v. *NLRB,* 249 F. 2d 332 (8th Cir. 1957); *NLRB* v. *Local 244, Int'l B'hd of Teamsters,* 284 F. 2d 887 (2d Cir. 1960); *NLRB* v. *International Union of United Brewery Workers,* 272 F. 2d 817 (10th Cir. 1959); *Milwaukee Plywood Co.* v. *NLRB,* 47 L.R.R.M. 2291 (7th Cir. Dec. 20, 1960).

the Court is to deal with what the Board decided here, it should identify and destroy the disease, not merely reverse the symptom.

III. THE UNDERLYING ERROR IN BOARD COUNSEL'S APPROACH

The reasoning in the Board's brief does not, as we have said, rest on the same basis as the Board's decision. This new reasoning can, perhaps, be best characterized by an example. If a plumber approaches a struck plant a picket may seek to induce him not to go in—even though no employees use the gate and the picketing has no other purpose —if the plumber is coming to do a short job like fixing the toilet. But if the plumber is coming to work on a big job in the plant, like installing an entirely new sanitation system, then the inducement is "secondary" and forbidden by the Act. In short, the more intimately and permanently the plumber's employer (or any other concern performing services for the struck plant) is connected with the struck enterprise, the more "secondary" the boycott.

This result, of course, confounds reason. It is based on two false premises: (1) that the duration of the contact between a neutral employer's workers and an industrial plant measures the severity of the damage to that employer if their access to the plant is interrupted; and (2) that the severity of damage to a neutral as the result of his employees' refusal to enter a struck plant is the determinant of whether the action causing the damage is "primary" or "secondary."

As to the first premise, the Board's brief assumes that an employer whose employees perform work in a struck plant for only a short time will be relatively undamaged if they are persuaded not to enter, while the stoppage of work on a construction project covering a longer period of time necessarily must seriously damage the construction contractor. There is no reason to believe that this is so. A contractor's

job at a struck plant, whatever its duration, may constitute only a minor fraction of his total business. He may easily be able to withdraw his employees from the struck premises and put them to work elsewhere with no consequent loss to him except inconvenience.

On the other hand, an employer whose employees are on the struck premises only briefly may be much more drastically affected by their refusal to cross the picket line. A carrier whose sole or principal business is the delivery of materials to a struck plant or the receipt of materials from that plant may be totally put out of business if his employees refuse to cross a picket line, even if they would ordinarily spend little time at the plant. Yet the Board's brief argues that the degree of involvement in the first case is much greater than in the second, and, on this basis, justifies the judgment that the inducement in the first case is "secondary", and in the second case "primary." [35]

This leads to consideration of the second premise—that the severity of damage to the neutral determines whether the action causing the damage is "primary" or "secondary." This is plainly not true and, indeed, begs the question. Secondary action violates the Act, even though the damage to the secondary employer may be small indeed. Primary action is plainly permissible, even though neutrals may be severely damaged by it. A supplier who ordinarily sells all of his products to a struck plant, or a distributor or retailer who is wholly dependent upon the plant's products, may be quite severely damaged by a strike at the plant. But the strike is not thereby converted to a secondary strike, nor is

---

[35] The Board's brief contains a further false assumption: that the fact that a construction project is of long duration means that the project has become the "regular working place" of the employees of the contractor. This is often not the case. Even on a construction project of very long duration individual employees may work only very short periods on the premises when the stage of construction calling for their particular skills is in progress. Indeed, this, rather than the converse, is the normal situation in building construction.

picketing directed to the employees of a struck plant converted to secondary picketing. Any attempt to divide that which is secondary from that which is primary by the extent of the damage presumably suffered by a neutral employer is the pursuit of a will-o'-the-wisp.

The crucial error made by counsel for the Board is to analogize a firm which has contracted to do work for the primary employer on his premises to an independent concern which simply leases space from the primary employer. *Cf. Retail Fruit & Vegetable Clerks Union (Crystal Palace Market),* 116 N.L.R.B. 856 which was enforced, without approval of its reasoning, in *Retail Fruit & Vegetable Clerks Union* v. *NLRB,* 249 F. 2d 591 (C.A. 10, 1957). In the latter situation the two employers conduct independent businesses. An appeal to the employees of the employer not involved in the labor dispute can affect the dispute only insofar as they require the independent employer to cease doing business with the primary employer. This is the evil which Congress intended to prevent.

On the other hand, in the situation presented here the work which is being done, while it is being done by an independent contractor, is being done for the benefit of and as part of the business of the employer with which the union has a dispute. The inducement of the employees of the contractor not to work on the struck premises places pressure directly upon the employer with whom the union has a dispute by depriving him of the benefit of the construction work which he has contracted to have performed on his premises. The contractor may himself be totally indifferent. It may be totally immaterial to him whether he completes his construction contract, or takes his men and works elsewhere. The picketing accomplishes its objection without any intervention on the part of the construction employer and without any consideration as to its effect upon him. He is not asked to assert pressure on the primary employer to grant the union's demands. The pressure is on the primary

employer and it is exerted, simply, by preventing him from having the work on his premises completed—by inducing, in other words, a total cessation of services for the employer, whether by his employees or others.

The difference between a true shared premises case and the present case is the nature of the relationship between the two employers. This, in turn, brings us back to the *Denver Building Trades* case, 341 U.S. 675.

The reliance which counsel for the Board placed upon the *Denver* case is wholly misplaced. *Denver* was decided initially by the same Board which decided *Ryan Construction* and *Moore Dry Dock*. The actual holding of the Board, and of this Court in upholding the Board, is entirely consistent with our analysis and wholly inconsistent with the use which is not sought to be made of that case.

In *Denver* the Building Trades Council had a dispute with a non-union electrical sub-contractor. A general contractor subcontracted part of the work on a construction project to this electrical contractor. The Council called a strike against the general contractor in an effort to force him to remove the sub-contractor from the premises. The employees of the general contractor, and of the other sub-contractors who were also induced to stop working, were not performing any work for the electrical sub-contractor or beneficial to him. To the contrary, he was working for the general contractor and the purpose and effect of the stoppage of work was to force or require the general contractor to stop doing business with the electrical contractor, i.e., to apply secondary, not primary, pressure.

The union's basic argument in *Denver* was that a construction project should be treated in the same way as an industrial plant and the various employers should be regarded, not as separate employers, but as joint participants in one building venture. The union's dispute, it was said, was with the general contractor's refusal to agree that the whole project should be union. It was this argument which

supplied the basis for the dissent in this Court and for the opinion of the Court of Appeals for the District of Columbia Circuit which was reversed by this Court. It is this argument which has supported the persistent and bi-partisan legislative efforts through the years to reverse the rule of the *Denver* case.

A majority of this Court held that the various contractors and sub-contractors on the building project should be treated as separate employers and that, no matter how phrased, the basic dispute was with the electrical sub-contractor. Once this was decided, the result in *Denver* followed as a matter of course.

But that result has, almost literally, nothing to do with this case. If we wish to make an analogy between this case and *Denver* we would deem General Electric here to be in the position of a general contractor, with the construction contractors in the same position as the electrical sub-contractor in *Denver*. The true parallel to *Denver*, if the analogy is pursued, would occur if there were a dispute between the construction workers and their employers, and the construction workers sought to picket the entire General Electric plant in order to induce General Electric to throw the contractors out. This would concededly, violate Sec. 8(b)(4)(A) irrespective of *Denver*—stopping the manufacture of appliances would be effective in the construction workers' dispute only through the pressure on a secondary employer, General Electric.

The only construction project case which would be similar to the present case would be the converse of the *Denver* case: Where there is a strike against a general contractor relating to his employees' wages and the union seeks to put pressure upon him by persuading the employees of a sub-contractor not to work on the struck project. In such a case *Denver* holds that the two employers are not to be considered as one industrial employer but as if they were separate employers in an industrial plant. But it does not fol-

low that the activity is secondary. To the contrary, if the general contractor is treated as if he were the operator of a business on the construction site, and the employees of the sub-contractors as if they were persons coming on his premises to do work which he has contracted for, the activity is plainly primary. On such an analogy the union could not strike the sub-contractor. It could, however, persuade the employees of subcontractors not to come on the site of the dispute and perform their work there because the effect of such action would be the denial of that work to the general contractor, not any inter-employer pressure.

It is argued, in the Board's brief, that in *PBM* the Board applied the *Denver* rule to find a violation of 8(b)(4)(A) in this converse case. *Local Union No. 55 and Carpenters' District Council (PBM), 108 N.L.R.B. 363 (1954).* But this decision was rendered by the "new" Board and over the dissent of the remaining old members and represented not an application of the *Denver* rule but a radical change in the thinking of the Board from the theory expressed in *Denver.* And the Board's order was sustained by the 10th Circuit only because the evidence clearly showed that, in addition to picketing the site at which the general contractor was building, the union threatened the sub-contractors that their employees would be disciplined and that they would be placed on unfair lists and deprived of employees if they did not cease work on the premises. *NLRB* v. *Local Union No. 55, 218 F. 2d 226, 228 (C.A. 10, 1954).* All of these factors clearly showed that the picketing was not directed simply at the work on the job but at the subcontractors generally.

But, passing the fact that the *PBM* case is clearly distinguishable, if it be assumed that the Board in that case regarded *Denver* as holding that workers cannot be persuaded not to perform work on a struck construction project, irrespective of which employer the union has a dispute with, it can only have done so on the premise that, because

of *Denver,* a construction project and a manufacturing plant are not to be treated alike and that inducements directed to the employees of separate employers which would be regarded as traditional primary activity in an industrial plant are to be treated as secondary on a construction project.

This Court, of course, held no such thing in *Denver.* What it held was that action against a separate employer on a construction project should be treated just like action against a separate employer in an industrial plant. It is, therefore, doubly fallacious to argue from the *Denver* case that the picketing here constituted "secondary" activity. The conclusion is false, first, because *Denver* did not hold that analogous activity on a construction project would be secondary. It is false, second, because even if *Denver* be regarded as so holding, this could only be because of an assumed difference between the relationship of general contractor to sub-contractor on a construction project and the relationship of a manufacturer and his contractors in an industrial plant. However adroitly put, the argument defeats itself. It asks, in effect, that this Court come to the *Denver* result by denying the very premise upon which *Denver* rested.

The plain fact is that the *Denver* case has nothing to do with this case. The rule applied by the Board did not rely on *Denver,* was not developed from *Denver* and represents, indeed, a radical departure from *Denver,* whether applied to an industrial plant or a construction project.

CONCLUSION

We have shown, we believe: (1) that the reasoning offered by counsel for the Board before this Court is not the reasoning, and indeed contradicts the basis upon which the Board decided this case; (2) that the Board's decision was based on a fundamental and pervasive error in the application of the statute; and (3) that the new, and contradic-

tory reasoning offered by Board counsel, will not withstand critical examination. For all of these reasons, the judgment of the court of appeals enforcing the Board's order should be reversed.

Respectfully submitted,

DAVID E. FELLER
JERRY D. ANKER
FELLER, BREDHOFF, AND ANKER
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

Attorneys for United Steelworkers of America and International Chemical Workers Union.

SUPREME COURT OF THE UNITED STATES

No. 321.—October Term, 1960.

Local 761, International Union of Electrical, Radio and Machine Workers, AFL–CIO, Petitioner, *v.* National Labor Relations Board, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1961.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Local 761 of the International Union of Electrical, Radio and Machine Workers, AFL–CIO was charged with a violation of § 8 (b)(4)(A) of the Taft-Hartley Act, 61 Stat. 136, 141, upon the following facts.

General Electric Corporation operates a plant outside of Louisville, Kentucky, where it manufactures washers, dryers, and other electrical household appliances. The square-shaped, thousand-acre, unfenced plant is known as Appliance Park. A large drainage ditch makes ingress and egress impossible except over five roadways across culverts, designated as gates.

Since 1954, General Electric sought to confine the employees of independent contractors, described hereafter, who work on the premises of the Park, to the use of Gate 3–A and confine its use to them. The undisputed reason for doing so was to insulate General Electric employees from the frequent labor disputes in which the contractors were involved. Gate 3–A is 550 feet away from the nearest entrance available for General Electric employees, suppliers, and deliverymen. Although anyone can pass the gate without challenge,[1] the

[1] During the strike in question a guard was stationed at the gate.

roadway leads to a guardhouse where identification must be presented. Vehicle stickers of various shapes and colors enable a guard to check on sight whether a vehicle is authorized to use Gate 3-A. Since January 1958, a prominent sign has been posted at the gate which states: "GATE 3-A FOR EMPLOYEES OF CONTRACTORS ONLY—G. E. EMPLOYEES USE OTHER GATES." On rare occasions, it appears, a General Electric employee was allowed to pass the guardhouse, but such occurrence was in violation of company instructions. There was no proof of any unauthorized attempts to pass the gate during the strike in question.

The independent contractors are utilized for a great variety of tasks on the Appliance Park premises. Some do construction work on new buildings; some install and repair ventilation and heating equipment; some engage in retooling and rearranging operations necessary to the manufacture of new models; others do "general maintenance work." These services are contracted to outside employers either because the company's employees lack the necessary skill or manpower, or because the work can be done more economically by independent contractors. The latter reason determined the contracting of maintenance work for which the Central Maintenance department of the company bid competitively with the contractors. While some of the work done by these contractors had on occasion been previously performed by Central Maintenance, the findings do not disclose the number of employees of independent contractors who were performing these routine maintenance services, as compared with those who were doing specialized work of a capital-improvement nature.

The Union, petitioner here, is the certified bargaining representative for the production and maintenance workers who constitute approximately 7,600 of the 10,500 employees of General Electric at Appliance Park. On

July 27, 1958, the Union called a strike because of 24 unsettled grievances with the company. Picketing occurred at all the gates, including Gate 3–A, and continued until August 9 when an injunction was issued by a Federal District Court. The signs carried by the pickets at all gates read: "LOCAL 761 ON STRIKE G. E. UNFAIR." Because of the picketing, almost all of the employees of independent contractors refused to enter the company premises.

Neither the legality of the strike or of the picketing at any of the gates except 3–A is in dispute, nor that the picketing was other than peaceful in nature. The sole claim was that the picketing before the gate exclusively used by employees of independent contractors was conduct proscribed by § 8 (b)(4)(A).

The Trial Examiner recommended that the Board dismiss the complaint. He concluded that the limitations on picketing which the Board had prescribed in so-called "common situs" cases were not applicable to the situation before him, in that the picketing at Gate 3–A represented traditional primary action which necessarily had a secondary effect of inconveniencing those who did business with the struck employer. He reasoned that if a primary employer could limit the area of picketing around his own premises by constructing a separate gate for employees of independent contractors, such a device could also be used to isolate employees of his suppliers and customers, and that such action could not relevantly be distinguished from oral appeals made to secondary employees not to cross a picket line where only a single gate existed.

The Board rejected the Trial Examiner's conclusion. 123 N. L. R. B. 1547. It held that since only the employees of the independent contractors were allowed to use Gate 3–A, the Union's object in picketing there was "to enmesh these employees of the neutral employers in

its dispute with the Company" thereby constituting a violation of § 8 (b)(4)(A) because the independent employees were encouraged to engage in a concerted refusal to work "with an object of forcing the independent contractors to cease doing business with the Company." [2]

The Court of Appeals for the District of Columbia granted enforcement of the Board's order, 278 F. 2d 282. Although noting that a fine line was being drawn, it concluded that the Board was correct in finding that the objective of the Gate 3–A picketing was to encourage the independent-contractor employees to engage in a concerted refusal to perform services for their employers in order to bring pressure on General Electric. Since the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification, we brought the case here, 364 U. S. 869.

I.

Section 8 (b)(4)(A) of the National Labor Relations Act provides that it shall be an unfair labor practice for a labor organization

> ". . . to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requir-

[2] Member Fanning concurred in the result, reasoning that the common-situs criteria set out by the Board in *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N. L. R. B. 547, could be applied to situations where the primary employer owned the premises, and that the requirement that the picketing take place reasonably close to the situs of the labor dispute had therefore been violated by the picketing around Gate 3–A.

> ing . . . any employer or other person . . . to cease doing business with any other person. . . ."

This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity. "While § 8 (b)(4) does not expressly mention 'primary' or 'secondary' disputes, strikes or boycotts, that section often is referred to in the Act's legislative history as one of the Act's 'secondary boycott sections.'" *Labor Board* v. *Denver Building Council*, 341 U. S. 675, 686. "Congress did not seek, by § 8 (b)(4), to interfere with the ordinary strike . . . ." *Labor Board* v. *International Rice Milling Co.*, 341 U. S. 665, 672. The impact of the section was directed toward what is known as the secondary boycott whose "sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *International Brotherhood of Electrical Workers* v. *Labor Board*, 181 F. 2d 34, 37. Thus the section "left a striking labor organization free to use persuasion, including picketing, not only on the primary employer and his employees but on numerous others. Among these were secondary employers who were customers or suppliers of the primary employer and persons dealing with them . . . and even employees of secondary employers so long as the labor organization did not . . . 'induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment' . . . ." *Labor Board* v. *Local 294, International Brotherhood of Teamsters*, 284 F. 2d 887, 889.

But not all so-called secondary boycotts were outlawed in § 8 (b)(4)(A). "The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives . . . . Employees must be induced; they must be induced to

engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person. Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited." *Local 1976, United Brotherhood of Carpenters* v. *Labor Board*, 357 U. S. 93, 98. See also *United Brotherhood of Carpenters (Wadsworth Building Co.)*, 81 N. L. R. B. 802, 805.

Important as is the distinction between legitimate "primary activity" and banned "secondary activity," it does not present a glaringly bright line. The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade. See *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N. L. R. B. 547. "[I]ntended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on their own employers." *Seafarers International Union* v. *Labor Board*, 265 F. 2d 585, 590. "It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises." *Id.*, at 591. "Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success." *Local 294, supra*, at 890. But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck

employer. *Labor Board* v. *International Rice Milling, supra.*

However difficult the drawing of lines more nice than obvious, the statute compels the task. Accordingly, the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause. Although "[n]o rigid rule which would make . . . [a] few factors conclusive is contained in or deducible from the statute," *Sales Drivers* v. *Labor Board*, 229 F. 2d 514, 517,[3] "[i]n the absence of admissions by the union of an illegal intent, the nature of acts performed shows the intent." *Seafarers International Union, supra*, at 591.

The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way during the fourteen years in which it has had to apply § 8 (b)(4)(A), and has modified and reformed its standards on the basis of accumulating experience. "One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, 800.

II.

The early decisions of the Board following the Taft-Hartley amendments involved activity which took place around the secondary employer's premises. For example, in *Wadsworth Building Co., supra*, the union set up a picket line around the situs of a builder who had contracted to purchase prefabricated houses from the primary

[3] See also *Labor Board* v. *General Drivers, Local 968*, 225 F. 2d 205

employer. The Board found this to be illegal secondary activity. See also *Printing Specialties Union (Sealbright Pacific)*, 82 N. L. R. B. 271. In contrast, when picketing took place around the premises of the primary employer, the Board regarded this as valid primary activity. In *Oil Workers International Union (Pure Oil Co.)*, 84 N. L. R. B. 315, Pure had used Standard's dock and employees for loading its oil onto ships. The companies had contracted that, in case of a strike against Standard, Pure employees would take over the loading of Pure oil. The union struck against Standard and picketed the dock, and Pure employees refused to cross the picket line. The Board held this to be a primary activity, although the union's action induced the Pure employees to engage in a concerted refusal to handle Pure products at the dock. The fact that the picketing was confined to the vicinity of the Standard premises influenced the Board not to find that an object of the activity was to force Pure to cease doing business with Standard, even if such was a secondary effect.

> "A strike, by its very nature, inconveniences those who customarily do business with the struck employer. Moreover, any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer. It does not follow, however, that such picketing is therefore proscribed by Section 8 (b)(4)(A) of the Act." 84 N. L. R. B., at 318.

See also *Newspaper & Mail Deliverers' Union (Interborough News Co.)*, 90 N. L. R. B. 2135; *International Brotherhood of Teamsters (Di Giorgio Wine Co.)*, 87 N. L. R. B. 720; *International Brotherhood of Teamsters (Rice Milling Co.)*, 84 N. L. R. B. 360.

In *United Electrical Workers (Ryan Construction Corp.)*, 85 N. L. R. B. 417, Ryan had contracted to perform construction work on a building adjacent to the Bucyrus plant and inside its fence. A separate gate was cut through the fence for Ryan's employees which no employee of Bucyrus ever used. The Board concluded that the union—on strike against Bucyrus—could picket the Ryan gate, even though an object of the picketing was to enlist the aid of Ryan employees, since Congress did not intend to outlaw primary picketing.

> "When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons. It makes no difference whether 1 or 100 other employees wish to enter the premises. It follows in this case that the picketing of Bucyrus premises, which was primary because in support of a labor dispute *with Bucyrus*, did not lose its character and become 'secondary' at the so-called Ryan gate because Ryan employees were the only persons regularly entering Bucyrus premises at that gate." 85 N. L. R. B., at 418. See also *General Teamsters (Crump, Inc.)*, 112 N. L. R. B. 311.

Thus, the Board eliminated picketing which took place around the situs of the primary employer—regardless of the special circumstances involved—from being held invalid secondary activity under § 8 (b)(4)(A).

However, the impact of the new situations made the Board conscious of the complexity of the problem by reason of the protean forms in which it appeared. This became clear in the "common situs" cases—situations where two employers were performing separate tasks on

common premises. The *Moore Dry Dock* case, *supra*, laid out the Board's new standards in this area. There, the union picketed outside an entrance to a dock where a ship, owned by the struck employer, was being trained and outfitted. Although the premises picketed were those of the secondary employer, they constituted the only place where picketing could take place; furthermore, the objectives of the picketing were no more aimed at the employees of the secondary employer—the dock owner—than they had been in the *Pure Oil* and *Ryan* cases. The Board concluded, however, that, when the situs of the primary employer was "ambulatory" there must be a balance between the union's right to picket and the interest of the secondary employer in being free from picketing. It set out four standards for picketing in such situations which would be presumptive of valid primary activity: (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises, (2) that the primary employer be engaged in his normal business at the situs, (3) that the picketing take place reasonably close to the situs, and (4) that the picketing clearly disclose that the dispute was only with the primary employer. These tests were widely accepted by reviewing federal courts. See, *e. g.*, *Labor Board* v. *Service Trade Chauffeurs*, 191 F. 2d 65 (C. A. 2d Cir.); *Piezonki* v. *Labor Board*, 219 F. 2d 879 (C. A. 4th Cir.); *Labor Board* v. *Chauffeurs, Teamsters*, 212 F. 2d 216 (C. A. 7th Cir.); *Labor Board* v. *Local 55*, 218 F. 2d 226 (C. A. 10th Cir.). As is too often the way of law or, at least, of adjudications, soon the *Dry Dock* tests were mechanically applied so that a violation of one of the standards was taken to be presumptive of illegal activity. For example, failure of picket signs clearly to designate the employer against whom the strike was directed was held to be violative of § 8 (b)(4)(A). See *Superior Derrick Corp.* v. *Labor Board*, 273 F. 2d 891; *Labor*

Board v. *Local 728*, 249 F. 2d 512; *Labor Board* v. *Local 728*, 228 F. 2d 791.[4]

In *Local 55 (PBM)*, 108 N. L. R. B. 363, the Board for the first time applied the *Dry Dock* test although the picketing occurred at premises owned by the primary employer. There, an insurance company owned a tract of land that it was developing, and also served as the general contractor. A neutral subcontractor was also doing work at the site. The union, engaged in a strike against the insurance company, picketed the entire premises, characterizing the entire job as unfair, and the employees of the subcontractor walked off. The Court of Appeals for the Tenth Circuit enforced the Board's order which found the picketing to be illegal on the ground that the picket signs did not measure up to the *Dry Dock* standard that they clearly disclose that the picketing was directed against the struck employer only. 218 F. 2d 226.

The Board's application of the *Dry Dock* standards to picketing at the premises of the struck employer was made more explicit in *Retail Fruit & Vegetable Clerks (Crystal Palace Market)*, 116 N. L. R. B. 856. The owner of a large common market operated some of the shops within, and leased out others to independent sellers. The union, although given permission to picket the owner's individual stands, chose to picket outside the entire market. The Board held that this action was violative of § 8 (b)(4)(A) in that the union did not attempt to minimize the effect of its picketing, as required in a common-situs case, on the operations of the neutral employers utilizing the market. "We believe . . . that the foregoing

---

[4] The *Dry Dock* criteria had perhaps their widest application in the trucking industry. There, unions on strike against truckers often staged picketing demonstrations at the places of pickup and delivery. Compare *International Brotherhood of Teamsters (Schultz Refrigerated Service, Inc.)*, 87 N. L. R. B. 502, with *International Brotherhood of Teamsters (Sterling Beverages, Inc.)*, 90 N. L. R. B. 401.

principles should apply to all common situs picketing, including cases where, as here, the picketed premises are owned by the primary employer." 116 N. L. R. B., at 859. The *Ryan* case, *supra*, was overruled to the extent it implied the contrary. The Court of Appeals for the Ninth Circuit, in enforcing the Board's order, specifically approved its disavowance of an ownership test. 249 F. 2d 591. The Board made clear that its decision did not affect situations where picketing which had effects on neutral third parties who dealt with the employer occurred at premises occupied solely by him. "In such cases, we adhere to the rule established by the Board . . . that more latitude be given to picketing at such separate primary premises than at premises occupied in part (or entirely) by secondary employers." 116 N. L. R. B., at 860, n. 10.

In rejecting the ownership test in situations where two employers were performing work upon a common site, the Board was naturally guided by this Court's opinion in *Rice Milling*, in which we indicated that the location of the picketing at the primary employer's premises was "not necessarily conclusive" of its legality. 341 U. S., at 671. Where the work done by the secondary employees is unrelated to the normal operations of the primary employer, it is difficult to perceive how the pressure of picketing the entire situs is any less on the neutral employer merely because the picketing takes place at property owned by the struck employer. The application of the *Dry Dock* tests to limit the picketing effects to the employees of the employer against whom the dispute is directed carries out the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *Labor Board* v. *Denver Building Council*, *supra*, at 692.

III.

From this necessary survey of the course of the Board's treatment of our problem, the precise nature of the issue before us emerges. With due regard to the relation between the Board's function and the scope of judicial review of its rulings, the question is whether the Board may apply the *Dry Dock* criteria so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employers' premises. The effect of such a holding would not bar the union from picketing at all gates used by the employees, suppliers, and customers of the struck employer. Of course an employer may not, by removing all his employees from the situs of the strike, bar the union from publicizing its cause, see *Local 618* v. *Labor Board*, 249 F. 2d 332. The basis of the Board's decision in this case would not remotely have that effect, nor any such tendency for the future.

The Union claims that if the Board's ruling is upheld, employers will be free to erect separate gates for deliveries, customers, and replacement workers which will be immunized from picketing. This fear is baseless. The key to the problem is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings.[5] In such situations, the indicated limitations on picketing

---

[5] *United Steelworkers (Phelps Dodge Refining Corp.)*, 126 N. L. R. B. 1367; *International Chemical Workers Union (Virginia-Carolina Chemical Corp.)*, 126 N. L. R. B. 905; see *Union de Trabajadores (Gonzales Chemical Industries, Inc.)*, 128 N. L. R. B. No. 116.

activity respect the balance of competing interests that Congress has required the Board to enforce. On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations. The 1959 Amendments to the National Labor Relations Act, which removed the word "concerted" from the boycott provisions, included a proviso that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." 29 U. S. C. (Supp. I, 1959) § 158 (b)(4)(B). The proviso was directed against the fear that the removal of "concerted" from the statute might be interpreted so that "the picketing at the factory violates section 8 (b)(4)(A) because the pickets induce the truck driver employed by the trucker not to perform their usual services where an object is to compel the trucking firm not to do business with the . . . manufacturer during the strike." Analysis of the bill prepared by Senator Kennedy and Representative Thompson, 105 Cong. Rec. 16589.

In a case similar to the one now before us, the Court of Appeals for the Second Circuit sustained the Board in its application of § 8 (b)(4)(A) to a separate-gate situation. "There must be a separate gate, marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations." *United Steelworkers* v. *Labor Board*, Doc. No. 26252, decided May 3, 1961. These seem to us controlling considerations.

IV.

The foregoing course of reasoning would require that the judgment below sustaining the Board's order be affirmed but for one consideration, even though this consideration may turn out not to affect the result. The legal path by which the Board and the Court of Appeals reached their decisions did not take into account that if Gate 3–A was in fact used by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric, the use of the gate would have been a mingled one outside the bar of § 8 (b)(4)(A). In short, such mixed use of this portion of the struck employer's premises would not bar picketing rights of the striking employees. While the record shows some such mingled use, it sheds no light on its extent. It may well turn out to be that the instances of these maintenance tasks were so insubstantial as to be treated by the Board as *de minimis*. We cannot here guess at the quantitative aspect of this problem. It calls for Board determination. For determination of the questions thus raised, the case must be remanded by the Court of Appeals to the Board.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE BLACK concur in the result.

SUPREME COURT OF THE UNITED STATES

No. 321.—October Term, 1960.

Local 761, International Union of Electrical, Radio and Machine Workers, AFL–CIO, Petitioner, v. National Labor Relations Board, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1961.]

Mr. Justice Douglas.

I did not vote to grant certiorari in this case because it seemed to me that the problem presented was in the keeping of the Courts of Appeals within the meaning of *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 490. Since the Court of Appeals followed the guide lines of that case (see 278 F. 2d 282, 286), I would leave the decision with it. I cannot say it made any egregious error, though I might have decided the case differently had I sat on the Labor Board or on the Court of Appeals.